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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061150
Party	Defendant Bigfoot Entertainment Inc.
Correspondence Address	BARTH X DEROSA DICKINSON WRIGHT PLLC 1875 EYE STREET NW, SUITE 1200 WASHINGTON, DC 20006 UNITED STATES slittlepage@dickinsonwright.com, bderosa@dickinsonwright.com, chold-er@dickinsonwright.com, trademark@dickinsonwright.com
Submission	Other Motions/Papers
Filer's Name	Barth X. deRosa
Filer's e-mail	bderosa@dickinsonwright.com, slittlepage@dickinsonwright.com, chold-er@dickinsonwright.com, trademark@dickinsonwright.com
Signature	/Barth X. deRosa/
Date	06/29/2015
Attachments	64884-2 Memo in Opp to Ps Motion for Suspension.pdf(141864 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FASHION TV PROGRAMMGESELLSCHAFT mbH Petitioner/Plaintiff, v. BIGFOOT ENTERTAINMENT, INC., Respondent/Defendant.	Cancellation No. 92061150 Registration No. 2,945,407

MEMORANDUM IN OPPOSITION TO
PETITIONER'S MOTION FOR SUSPENSION

Respondent/Defendant, Bigfoot Entertainment, Inc., through its attorneys, hereby opposes Petitioner's Motion for Suspension that was filed on June 9, 2015. That motion was grounded on the fact that Petitioner, as a declaratory judgment plaintiff, also filed a civil action in the U.S. District Court for the Southern District of New York.

While suspension of the TTAB proceeding might be warranted at a later time, it is, at this stage, a bit premature. In this connection, the Board should first take the opportunity to decide Respondent's Motion to Dismiss. If, as argued, Petitioner neither has standing nor a claim upon which relief can be granted, then the Motion to Dismiss could very well prove dispositive in this particular cancellation. In which case, the Motion for Suspension due to a pending civil action could very well become moot.

FACTS

Respondent, in lieu of an answer, filed a Motion to Dismiss on May 4, 2015. Petitioner filed its Memorandum in Opposition to that Motion to Dismiss on May 19, 2015, together with an Amended Petition to Cancel as a matter of right. Respondent filed its Reply Brief in Support

of its Motion to Dismiss on June 3, 2015, pointing out that Petitioner still failed to allege a set of facts that would support its standing to bring the cancellation, and also that its Amended Petition to Cancel still failed to state a claim upon which relief could be granted.

Rather than seek leave to file a Sur-Reply to address the critical and material issues raised in the Motion to Dismiss, Petitioner instead filed a Motion for Suspension pending the outcome of the declaratory judgment action it instituted in U.S. District Court for the Southern District of New York – an action that has been pending since mid-December 2014. That declaratory judgment action is subject, as well, to Motions to Dismiss.

ARGUMENT AND THE LAW

The question presented is simply why Petitioner is seeking suspension now, rather than a few months ago? The logical conclusion is that Petitioner is attempting to evade addressing the dispositive issues about standing and whether it, in fact, has stated a valid claim for trademark abandonment.

While Respondent appreciates the wide discretion afforded the Board under 37 C.F.R. Section 2.117(a) to suspend a proceeding or not, the Board should, in this instance, first decide the pending Motion to Dismiss. In this connection, Petitioner's Motion was filed in flagrant disregard of the Board's Order dated May 8, 2015, wherein the Board cautioned that "Any paper filed during the pendency of this motion [Motion to Dismiss] which is not relevant thereto will be given no consideration." Petitioner's Motion for Suspension is in no way relevant to the Motion to Dismiss.

Further, under TMBP Section 510.02(a), the Board "may" decide the dispositive motion first. "The purpose of this rule is to prevent a party served with a potentially dispositive motion from escaping the motion by filing a civil action and then moving to suspend before the Board has decided the potentially dispositive motion." *Id*.

The issue of Petitioner's standing to bring this cancellation is critical, and Petitioner should not be permitted to escape its burden and at the same time "cast a question" on Respondent's legitimate rights to engage in commerce with the registered mark, particularly at this stage -- a stage when Respondent just purchased the rights to the mark in December 2014 for millions of dollars, and is just now "ramping up" with its use. As noted in the Motion to Dismiss, Petitioner does not contest the affirmative assertions it is no more than a "mere intermeddler," having brought the cancellation for no other purpose than to apparently harass Respondent – a direct competitor and former "business associate" of Petitioner. Nor does Petitioner address its failure to properly assert a claim upon which relief can be granted. As a consequence, Petitioner should not derive any benefit -- commercial or otherwise -- by its questionable legal actions.

CONCLUSION

With Petitioner's "intermeddler" status and its failure to state a claim so apparent, the Board should first decide the Motion to Dismiss. In all probability, a dismissal will bring this matter to a conclusive close.

Respectfully submitted,

BIGFOOT ENTERTAINMENT, INC.

Date: June 29, 2015

/s/ Barth X. deRosa

Barth X. deRosa
Samuel D. Littlepage
Jenny T. Slocum
DICKINSON WRIGHT PLLC
1875 Eye Street, N.W.
Suite 1200
Washington, DC 20006
Telephone: (202) 457-0160
Facsimile: (202) 659-6962

Counsel for Respondent/Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum in Opposition to Petitioner's Motion for Suspension is being forwarded this 29th day of June, 2015 to counsel for Petitioner by email and first class mail, addressed to:

Raymond J. Dowd
Dunnington Bartholow & Miller
1359 Broadway, Ste. 600
New York, NY 10018
rdowd@dunnington.com

/s/ Barth X. deRosa
Barth X. deRosa

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